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No. 91-8199

In The

Supreme Court of the United States

October Term, 1992

THOMAS LEE DEAL,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Petitioner's fifth amendment due process rights were violated by not applying the rule of lenity to the "second or subsequent conviction" language in 18 U.S.C. § 924(c)(1).

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 31) is reported at 954 F.2d 262 (5th Cir. 1992). The judgment of the district court (J.A. 28) is not reported.

JURISDICTION

The decision of the court of appeals (J.A. 31) was announced on February 7, 1992. The petition for certiorari was filed on May 7, 1992. Certiorari was granted on October 5, 1992. (J.A. 35). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution provides, in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . . " U.S. Const. amend. V.

STATUTORY PROVISION INVOLVED[1]

Section 924(c) of Title 18, United States Code provides, in pertinent part:

> (1) Whoever, during and in relation to any crime of violence . . . , uses or carries a firearm,

[1] The full text of 18 U.S.C. § 924(c)(1) (1988) is set out in the Appendix to this Brief at A-1.

shall, in addition to the punishment provided for such crime of violence . . . , be sentenced to imprisonment for five years . . . . In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years . . . . Notwithstanding any other provision of law, . . . the term of imprisonment imposed under this subsection [shall not] run concurrently with any other term of imprisonment including that imposed for the crime of violence . . . in which the firearm was used or carried.

STATEMENT

The Petitioner, Thomas Lee Deal, was charged in a thirteen-count superseding indictment with six different bank robberies, in violation of 18 U.S.C. § 2113(a) and (d); with six different uses of a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1); and with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). (J.A. 2).

A jury returned a verdict of guilty on all counts. (J.A. 28). After the verdict, but prior to sentencing, the United States Probation Office prepared a presentence investigation report, which recommended that the court impose a sentence of imprisonment of 105 years for the violations of 18 U.S.C. § 924(c)(1). (R. Tab 58, filed under seal). Pursuant to local procedure, the Petitioner timely filed a written statement in which he objected to the proposed sentence of 105 years on the ground that the twenty-year enhancement was not applicable to five of the six section 924(c) violations. (J.A. 21).

At the sentencing hearing, counsel elaborated on the written objections. (J.A. 25-26). The district court overruled the objections and sentenced the Petitioner to serve a term of imprisonment of 168 months for the bank robberies and for being a felon in possession of a firearm, followed by a term of imprisonment of 105 years for the violations of 18 U.S.C. § 924(c). (J.A. 26-27). The district court's rationale for imposing the 105-year sentence was that Congress intended for a defendant to be sentenced to a consecutive term of five years' imprisonment for the first violation of section 924(c) and to a consecutive term of 20 years on each of the remaining five violations. (J.A. 26).

The Petitioner timely appealed to the Fifth Circuit Court of Appeals. On February 7, 1992, that court entered its opinion affirming the Petitioner's conviction and sentence, concluding that earlier decisions in other circuits had properly decided that a first conviction and a "second or subsequent conviction" under 18 U.S.C. § 924(c) can result from the same indictment. *United States v. Deal*, 954 F.2d 262, 263 (5th Cir. 1992). (J.A. 33-34).

This Court granted certiorari on October 5, 1992. (J.A. 35).

SUMMARY OF ARGUMENT

I.

Because "second or subsequent conviction" is ambiguous, the Court must look to the legislative history of 18 U.S.C. § 924(c)(1) for elucidation of its meaning.

A. The text of a statute is ambiguous if, after examination, a reasonable doubt persists about its intended scope. *See Moskal v. United States*, 111 S. Ct. 461, 465 (1990); *cf. United States v. R.L.C.*, 112 S. Ct. 1329, 1338 (1992). The Court should look to the legislative history of the statute for elucidation if the text is ambiguous. *Moskal*, 111 S. Ct. at 465; *but see R.L.C.*, 112 S. Ct. at 1339-41 (Scalia, J., concurring in part and concurring in the judgment).

B. "Second or subsequent conviction" is ambiguous. The words "second" and "subsequent" mean "another," "next after the first in time," or "occurring later." *See Random House Dictionary of the English Language* 1729, 1876 (2d ed. unabridged 1987). The statute does not indicate which of these meanings Congress intended. The language of the statute also does not clarify whether "or" is used to correlate or distinguish the meanings of "second" and "subsequent." *Compare Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979), *with DeSylva v. Ballentine*, 351 U.S. 570, 573 (1956). Finally, "conviction" means either the return of a jury verdict of guilt or the entry of a final judgment on that verdict. *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 112 n.6 (1983); *Lott v. United States*, 367 U.S. 421, 427 (1961). Even if the statute is interpreted in light of these multiple meanings, nothing in the text or structure of section 924(c) indicates whether "second or subsequent conviction" means "an additional finding of guilt rendered at any time" or "an additional judgment of conviction entered later in time."

C. Lower courts that have found "second or subsequent conviction" to be unambiguous have ignored the ambiguity of "conviction" or have presumed that it has only one meaning. *See, e.g., United States v. Bernier*, 954 F.2d 818, 820 (2d Cir. 1992); *United States v. Raynor*, 939 F.2d 191, 193-94 (4th Cir. 1991); *United States v. Rawlings*, 821 F.2d 1543, 1545-46 (11th Cir.), *cert. denied*, 484 U.S. 979 (1987).

D. In sum, because a reasonable doubt persists about the meaning of "second or subsequent conviction," the Court must look to the legislative history of section 924(c). *See Moskal*, 111 S. Ct. at 465; *but see R.L.C.*, 112 S. Ct. at 1339-41 (Scalia, J., concurring in part and concurring in the judgment).

II.

The legislative history of section 924(c) does not resolve the ambiguity of "second or subsequent conviction."

A. Section 924(c) "was enacted as part of the Gun Control Act of 1968, was not included in the original Gun Control bill, but was offered as an amendment on the House floor by Representative Poff." *Simpson v. United States*, 435 U.S. 6, 13 (1978). The amendment passed on the same day it was offered. *See Busic v. United States*, 446 U.S. 398, 405 (1980). Thus, the Court must search for clues to legislative intent from the "sparse pages of floor debate." *Id.* The sponsor of section 924(c) intended that, if a person uses a gun and "is caught and convicted, he is going to jail . . . [and] if he does so a second time, he is going to jail for a longer time." 114 Cong. Rec. 22,231 (1968) (statement of Rep. Poff). These sparse comments do not compel a particular interpretation of "second or subsequent conviction." *See S & E Contractors, Inc. v. United States*, 406 U.S. 1, 13 n.9 (1972).

B. The inquiry into the meaning of "second or subsequent conviction" is not advanced by reliance on the general desire of Congress to deter firearm abuses. *See Busic*, 446 U.S. at 408. The desire of Congress was not unbounded, and the Court's "task here is to locate one of the boundaries." *Id.*

C. Although a review of other federal, recidivist statutes ordinarily might assist the inquiry, *see, e.g., Dickerson*, 460 U.S. at 115, it sheds little light on the language of section 924(c) because of "the haste in this legislation" and the "considerable confusion as to the meanings of words" when it was offered and passed. 114 Cong. Rec. 22,243 (1968) (statement of Rep. Hunt, supporting the Casey amendment). Nevertheless, various federal statutes impose an enhanced punishment on an offender only when he has a *prior* conviction. *See, e.g.*, 21 U.S.C. §§ 841 (b)(1)(A), (B), 844(a), 860(b) (1988). If these statutes are relevant to the inquiry, their language supports the interpretation that "second or subsequent conviction" means "an additional judgment of conviction entered later in time."

III.

The Petitioner's due process rights were violated by the failure of the lower courts to apply the rule of lenity to "second or subsequent conviction."

A. The rule of lenity is not merely a convenient statutory maxim, but also is "rooted in fundamental principles of due process." *Dunn v. United States*, 442 U.S. 100, 112 (1979). The rule is based upon the traditional policy of fair warning "of what the law intends to do if a certain line is passed" and upon " 'the instinctive distaste against

men languishing in prison unless the lawmaker has clearly said they should.' " *United States v. Bass*, 404 U.S. 336, 347-48 (1972), *quoted in R.L.C.*, 112 S. Ct. at 1338. Thus, "the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner v. United States*, 358 U.S. 169, 178 (1958).

B. The first time the Petitioner ever was haled into court for any violation of section 924(c) he was sentenced to serve a term of 100 years in prison for five of the six violations charged under the statute. Because "second or subsequent conviction" could mean "an additional finding of guilt rendered at any time" or "a judgment of conviction entered at a later time," the Petitioner did not have fair warning of what the law intended to do or that he would be sentenced to languish in jail for 100 years. Thus, his due process rights were violated by the failure of the lower courts to apply the rule of lenity.

C. Because the rule of lenity applies in this case, the Court must choose the construction yielding the shorter sentence. *R.L.C.*, 112 S. Ct. at 1338. For this reason, the Court should hold that "second or subsequent conviction" means "an additional judgment of conviction entered later in time."

ARGUMENT

I. BECAUSE THE MEANING OF "SECOND OR SUBSEQUENT CONVICTION" IS AMBIGUOUS AS USED IN THE STATUTORY TEXT, THE COURT MUST LOOK TO THE LEGISLATIVE HISTORY OF 18 U.S.C. § 924(c).

A. When the Statutory Text Is Ambiguous, the Court Must Examine the Legislative History of the Statute.

In all cases involving statutory interpretation, this Court looks "first to the language of the statute itself." *Hughey v. United States*, 495 U.S. 411, 415 (1990). When construing the language, the Court has long held that Congress uses words as they are commonly and ordinarily understood. *See Moskal v. United States*, 111 S. Ct. 461, 465 (1990); *Perrin v. United States*, 444 U.S. 37, 42 (1979); *Richards v. United States*, 369 U.S. 1, 9 (1962). It is assumed, therefore, that the plain meaning of a statute is apparent from its terms. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Any interpretation of those terms must give " 'effect, if possible, to every clause and word of a statute.' " *Moskal*, 111 S. Ct. at 466 (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)).

Although the precise criterion for statutory ambiguity is difficult to establish in the abstract, *see Moskal*, 111 S. Ct. at 465, it is clear that statutory ambiguity is the "touchstone" for cases involving the rule of lenity. *Bifulco v. United States*, 447 U.S. 381, 387 (1980). In this context, a statutory provision is ambiguous if a reasonable doubt persists about the provision's intended scope. *See Moskal*,

111 S. Ct. at 465; *cf. United States v. R.L.C.*, 112 S. Ct. 1329, 1338 (1992) (employing criterion of whether two plain meanings of a term are equally consistent with the statutory text).

The Court should look to the legislative history to ascertain the legislative intent if the language of a statute is ambiguous. *See R.L.C.*, 112 S. Ct. at 1334; *Chapman v. United States*, 111 S. Ct. 1919, 1926 (1991); *Moskal*, 111 S. Ct. at 465; *but see R.L.C.*, 112 S. Ct. at 1339-41 (Scalia, J., concurring in part and concurring in the judgment) (stating that a finding of ambiguity ends the matter and that the rule of lenity then applies). Thus, the threshold question is whether the language of section 924(c) is ambiguous.

B. The Meaning of "Second or Subsequent Conviction" Is Ambiguous, as Used in the Statutory Text.

In pertinent part, 18 U.S.C. § 924(c) provides as follows:

> (1) Whoever, during and in relation to any crime of violence . . . , uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence . . . , be sentenced to imprisonment for five years . . . . *In the case of his second or subsequent conviction* under this subsection, such person shall be sentenced to imprisonment for twenty years . . . . Notwithstanding any other provision of law, . . . the term of imprisonment imposed under this subsection [shall not] run concurrently with any other term of imprisonment

> including that imposed for the crime of violence . . . in which the firearm was used or carried.

18 U.S.C. § 924(c)(1) (1988) (emphasis added); *see infra* note 9 (discussing history of amendments).

"In the case of his second or subsequent conviction" is ambiguous, when it is applied to multiple violations of section 924(c) that are charged in one indictment. It is difficult, if not impossible, to give effect unambiguously to every clause and word in attempting to discern its meaning. First, although the meanings of "second" and "subsequent" can be distinguished, they also overlap. The generally accepted pertinent definitions of "second" are: (1) next after the first, being the ordinal number for two; (2) next after the first in place, time, or value; and (3) other or another. *See Random House Dictionary of the English Language* 1729 (2d ed. unabridged 1987) (listing twenty-nine definitions). "Subsequent" is defined in two ways: (1) occurring or coming later or after; and (2) following in order or succession. *Id.* at 1876. The language of the statute does not indicate whether Congress intended "second or subsequent conviction" to apply merely to "another" conviction "following in order" after the first, or to a conviction "coming later" than the first or "next after the first in . . . time."

Second, the meaning of "second or subsequent" depends on the use of the word "or." When words are connected by the disjunctive "or," they ordinarily are to be given separate meanings. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). The word "or" also may be used as a careless substitute for the word "and" in phrases where "and" would express the thought with greater clarity.

DeSylva v. Ballentine, 351 U.S. 570, 573 (1956). The language of the statute does not clarify whether "or" was used to correlate or distinguish the meanings of "second" and "subsequent."[2]

Finally, because the word "conviction" is ambiguous, the applicability of the twenty-year enhancement under 18 U.S.C. § 924(c) also is unclear when one indictment charges more than one violation of the statute. "Conviction" is not defined in section 924(c),[3] and it can mean either the return of a jury verdict of guilt or the entry of a final judgment on that verdict. *See Black's Law Dictionary* 331-32 (6th ed. 1990); *see also Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 112 n.6 (1983); *Lott v. United States*, 367 U.S. 421, 427 (1961). The meaning varies from statute to statute. *Dickerson*, 460 U.S. at 113 n.7. In some statutes, the term is specifically defined. *Id.* at 112 n.6. As noted in the dissenting opinion in *Dickerson*, nothing in the plain language of the Gun Control Act, of which section 924(c) is a part, indicates which meaning Congress intended. *Id.* at 123-24 (Rehnquist, C.J., dissenting). The text of the statute is "at least equally consistent" with both meanings. *R.L.C.*, 112 S. Ct. at 1334.[4]

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[2] *See infra* note 7.

[3] The only terms defined in the section are "drug trafficking crime," *see* 18 U.S.C. § 924(c)(2), and "crime of violence," *see* 18 U.S.C. § 924(c)(3).

[4] The phrase "in the case of his" serves only to exacerbate the ambiguity because it is unclear whether its intended meaning is "in the event of" or literally "in the legal case of." *See Random House Dictionary of the English Language* 321 (2d ed. unabridged 1987).

In short, a reasonable doubt persists as to the intended scope of "second or subsequent conviction." *See Moskal*, 111 S. Ct. at 465. As concluded by the Tenth Circuit:

> '[S]econd or subsequent' can be read to describe either multiple events occurring at one time or multiple events occurring in chronological sequence. 'Conviction' can refer either to the return of a jury verdict of guilt or to the court's entry of judgment on that verdict.

United States v. Abreu, 962 F.2d 1447, 1450 (10th Cir. 1992) (en banc). Thus, it is unclear whether the scope of the text covers a defendant who "is charged in one indictment with more than one section 924(c) offense and a single judgment of conviction is entered on that indictment." *Id.*

C. Lower Courts Have Ignored the Ambiguity of "Conviction."

No court of appeals, other than the Tenth Circuit, has found "second or subsequent conviction" to be ambiguous.[5] Holding that the language is clear, a number of courts rely on the reasoning of the Fourth and Eleventh

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[5] *See United States v. Neal*, No. 91-10078, 1992 U.S. App. LEXIS 24727, at *5 – *6 (9th Cir. Oct. 5, 1992); *United States v. Bernier*, 954 F.2d 818, 820 (2d Cir. 1992); *United States v. McGee*, 952 F.2d 398 (4th Cir. 1991) (unpublished), No. 90-5762, 1991 U.S. App. LEXIS 29757, at *16 – *17 (4th Cir. Dec. 20, 1991); *United States v. Livingston*, 941 F.2d 431, 435-36 (6th Cir. 1991); *United States v. Raynor*, 939 F.2d 191, 193-94 (4th Cir. 1991); *United States v. Grinnell*, 915 F.2d 667, 668 (11th Cir. 1990) (per curiam); *United States v. Hamblin*, 911 F.2d 551, 552-55 (11th Cir. 1990), *cert. denied sub nom. Jones v. United States*, 111 S. Ct. 2241 (1991); *United States v. Bennett*, 908 F.2d 189, 194-95 (7th Cir.), *cert. denied*, 111 S. Ct. 534 (1990); *United States v. Nabors*, 901 F.2d 1351, 1357-59 (6th Cir.), *cert. denied*, 111 S. Ct. 192 (1990); *United States v. Foote*, 898 F.2d 659, 668-69 (8th Cir.), *cert. denied sub nom. Thompson v. United States*, 111 S. Ct. 112 (1990); *United States v. Rawlings*, 821 F.2d 1543, 1545 (11th Cir.), *cert. denied*, 484 U.S. 979 (1987); *cf. United States v. Luskin*, 926 F.2d 372, 374 n.2 (4th Cir. 1991) (affirming consecutive five-year sentence, but declining to address enhancement because it was not raised by the government); *United States v. Torres*, 862 F.2d 1025, 1032 (3d Cir. 1988) (affirming section 924(c) sentence, but declining to address the enhancement issue because of the government's stipulation to one sentence); *United States v. Fontanilla*, 849 F.2d 1257, 1258 (9th Cir. 1988) (affirming two consecutive five-year sentences).

Circuits.[6] They either fail to consider the ambiguity of "conviction," however, or presume that it has only one particular meaning. Indeed, in its seminal decision on section 924(c), the Eleventh Circuit Court of Appeals found the meaning of "second or subsequent conviction" unambiguous, but did not inquire into the multiple meanings of "conviction." *See United States v. Rawlings*, 821 F.2d 1543, 1545-46 (11th Cir.), *cert. denied*, 484 U.S. 979 (1987).

Following *Rawlings* and other circuits, the Fourth Circuit, in *United States v. Raynor*, 939 F.2d 191 (4th Cir. 1991), reasoned that the application of the enhancement "does not depend on satisfying conditions that the second or subsequent conviction be by reason of a different indictment, or that the sentence be imposed on the first

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[6] *See, e.g., Neal*, No. 91-10078, 1992 U.S. App. LEXIS 24727, at *5 – *6; *Livingston*, 941 F.2d at 435-36; *Bennett*, 908 F.2d at 194; *Nabors*, 901 F.2d at 1358; *Foote*, 898 F.2d at 668.

conviction before the enhancement can apply to the second, or that the defendant have served the sentence imposed on the first." *Id.* at 193. In so reasoning, the court incorrectly presumed that "conviction" is unambiguous and means only a finding of guilt prior to the entry of judgment. Similarly, the Second Circuit Court of Appeals focused on the disjunctive "or" and reasoned that "second" and "subsequent" must be construed as having different meanings. *United States v. Bernier*, 954 F.2d 818, 819 (2d Cir. 1992).[7] Finding this construction persuasive, the court held that the "plain language of the statute . . . means that the enhanced 20 year penalty must be imposed notwithstanding the simultaneity of the second conviction." *Id.* Focusing on the disjunctive, however, simply ignores the problem of the ambiguity of "conviction."[8]

D. Summary

In sum, the language of section 924(c)(1) "is, at best, hard to follow in simple English." *United States v. Nabors*, 901 F.2d 1351, 1358 (6th Cir.), *cert. denied*, 111 S. Ct. 192 (1990). Whether "second or subsequent conviction" means "an additional finding of guilt rendered at any time" or "an additional judgment of conviction entered later in time" is unclear. The fact that persons possessed

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[7] Nevertheless, even *Bernier* found it "conceivable that the word 'subsequent' is used as a synonym for the word 'second' in section 924(c)." *See* 954 F.2d at 819.

[8] The most recent case that disregards the ambiguity of "conviction" is *United States v. Neal*, No. 91-10078, 1992 U.S. App. LEXIS 24727, at *5 – *6 (9th Cir. Oct. 5, 1992).

of reasonable minds can "find directly opposite 'plain meanings' in this statute, suggests at a minimum that the phrase 'second or subsequent conviction' is ambiguous as applied to simultaneous convictions of separate counts in an indictment." *United States v. Neal*, No. 91-10078, 1992 U.S. App. LEXIS 24727, at *9 - *10 (9th Cir. Oct. 5, 1992) (Fletcher, J., dissenting). Because "second or subsequent conviction" is ambiguous, the Court must look to the legislative history to ascertain whether the ambiguity can be explained or elucidated. *See R.L.C.*, 112 S. Ct. at 1334; *see also Chapman*, 111 S. Ct. at 1926; *Moskal*, 111 S. Ct. at 465; *but see R.L.C.*, 112 S. Ct. at 1339-41 (Scalia, J., concurring in part and concurring in the judgment).

II. THE LEGISLATIVE HISTORY OF THE STATUTE DOES NOT RESOLVE THE AMBIGUITY OF "SECOND OR SUBSEQUENT CONVICTION."

A. The Legislative History Provides Little Elucidation.

Section 924(c) "was enacted as part of the Gun Control Act of 1968, was not included in the original Gun Control bill, but was offered as an amendment on the House floor by Representative Poff." *Simpson v. United States*, 435 U.S. 6, 13 (1978). The amendment passed on the same day it was offered. *See Busic v. United States*, 446 U.S. 398, 405 (1980). As the Court noted in *Busic v. United States*, moreover, "the committee reports and congressional hearings to which we normally turn for aid in these situations simply do not exist, and we are forced in consequence to search for clues to congressional intent in

the sparse pages of floor debate that make up the relevant legislative history." *Id.; see* 114 Cong. Rec. 22,229-48, 27,141-44 (1968).[9]

A reading of the congressional debates reveals, as this Court has recognized, that the "overriding purpose of 924(c) was to combat the increasing use of *guns* in the commission of federal felonies." *Simpson*, 435 U.S. at 10 n.4 (emphasis in original). The debate in the House of Representatives does not provide any detailed analysis of the use of the words "second" and "subsequent."[10] The focus of the House debate was on enacting legislation that would require "stiff mandatory sentences" and would address repeated offenses "committed by those who are out on parole and out on bond." 114 Cong. Rec.

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[9] The full text of the passages quoted from the floor debate is set out in the Appendix to this Brief at B-1. Subsequent to the Poff amendment, Pub. L. No. 90-618, Title I, § 102, 82 Stat. 1223 (Oct. 22, 1968), Congress lowered the minimum punishment for a second or subsequent conviction from five years to two years and prohibited courts from imposing concurrent sentences. *See* Pub. L. No. 91-644, Title II, § 13, 84 Stat. 1889, 1890 (Jan. 2, 1971). In 1984, Congress increased the minimum levels of punishment from one year to five years for the first conviction, and from two years to ten years for the second or subsequent conviction under this section, and it also prohibited parole. *See* Pub. L. No. 98-473, Title II, Part D § 1005, 98 Stat. 2138, 2139 (Oct. 12, 1984). In 1986, Congress increased the punishment for crimes involving machine guns and silencers. *See* Pub. L. No. 990-308, § 104(a)(2), 100 Stat. 456, 457 (May 19, 1986). Since 1988, Congress twice has increased the ranges of punishment. *See* Pub. L. No. 100-690, § 6460, 102 Stat. 4373, 4374 (Nov. 18, 1988); *see also* Pub. L. No. 101-647, § 1101, 104 Stat. 4829 (Nov. 29, 1990).

[10] The Senate amendment uses only the term "subsequent." *See* 114 Cong. Rec. 27,142 (1968).

22,230 (statement of Rep. Casey). As stated by Representative Casey, offenders "seldom get in there long enough for the psychologist and the penologist to shake hands with them before they are out again." *Id.* The general purpose of this section was to "provide the strongest deterrent to preclude the repetition of the crimes of violence and the unlawful use of firearms in their commission." *Id.* at 22,234 (statement of Rep. Harsha). Throughout the debate, the discussion emphasized mandatory sentences that could not be suspended. *See, e.g., id.* at 22,230-31, 22,237.

As reflected in the words of Representative Poff, the sponsor of section 924(c), the enhanced penalty was provided so that repeat offenders would receive stronger punishment than they did the first time they served a sentence of imprisonment: "Any such person should understand that if he uses his gun and is caught and convicted, he is going to jail. He should further understand that if he does so a second time, he is going to jail for a longer time." *Id.* at 22,231.[11] Representative Rogers supported Representative Poff's amendment on the ground "that any person who commits a crime and uses a gun will know that he cannot get out of serving a penalty in jail. And if he does it a second time, there will be a stronger penalty." *Id.* at 22,237. At best, these statements

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[11] Because Representative Poff was the sponsor of this provision, his comments are entitled to weight. *See Simpson*, 435 U.S. at 13; *see also S & E Contractors, Inc. v. United States*, 406 U.S. 1, 13 n.9 (1972) (noting that the Court has been extremely wary of floor debates "save for precise analyses of statutory phrases by the sponsors of the proposed laws").

support the Petitioner's position that "second or subsequent conviction" does not cover multiple violations of section 924(c) alleged in one indictment.[12] At worst, these statements are equivocal.[13] As concluded in *United States v. Abreu*, 962 F.2d 1447 (10th Cir. 1992) (en banc), therefore, these isolated statements do "not compel a particular interpretation of 'second or subsequent *conviction*' " and "could support either of two equally plausible meanings." *Id.* at 1450 (emphasis in original).

B. The Inquiry Is Not Advanced by Reliance on the General Desire of Congress.

Although the Eleventh Circuit Court of Appeals, in *United States v. Rawlings*, 821 F.2d 1543, 1546 (11th Cir.), *cert. denied*, 484 U.S. 979 (1987), relied on the statements of Representatives Poff and Rogers in concluding that congressional intent was consistent with the "clear language of § 924(c)," *id.* at 1547, as noted previously, it failed to address the ambiguity of "conviction." *See* discussion *supra* part I.B. By buttressing this conclusion with Congress's general "intent to punish severely those who

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[12] *See also* 114 Cong. Rec. 22,238 (statement of Rep. Whitten). Representative Whitten apparently construed section 924(c) to require a conviction on the underlying violent felony and an appeal upholding the conviction "before you can convict the accused of so using a gun." *Id.*

[13] Apparently, Representative Poff conceived of each prosecution as involving only one underlying felony and one firearm offense. *See* 114 Cong. Rec. 22,232 (responding to Rep. Ichord). This conception of the prosecutorial unit supports the construction of "in the case of his" as meaning "in the legal case of." *See supra* note 4.

use firearms during crimes of violence," *id.* at 1546, it also failed to abide by the teachings of this Court on construing precisely the scope of section 924(c):

> In addition . . . , the Government contends that our reading of the legislative materials is unreasonable because those who supported the Poff amendment . . . were clearly committed to meting out stiff penalties for use of a firearm in the course of a felony . . . . The argument is overdrawn. . . . As we understand it, the Government's argument is . . . that our construction fails to enhance that penalty to the hilt. Yet it is patently clear that Congress too has failed to enhance that penalty to the hilt . . . . Thus, while Congress had a general desire to deter firearm abuses, that desire was not unbounded. Our task here is to locate one of the boundaries, and the inquiry is not advanced by asserting that Congress wanted no boundaries.

Busic, 446 U.S. at 408.[14] Thus, the Tenth Circuit's interpretation surpasses the Eleventh Circuit's because it

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[14] The Eleventh Circuit also relied on the policy of judicial economy: "[A] prosecutor could simply bring the two offenses in two separate indictments, thereby insuring that one of the convictions would occur later in time than the other. Such manipulation of the court system would add to the court's caseload and serve no useful purpose." *Rawlings*, 821 F.2d at 1546. This reasoning, however, turns the question at issue on its head. The legal question, first, is whether the text of the statute and the legislative history are unclear, and if so, whether the rule of lenity applies. If the rule of lenity applies and the twenty-year enhancement cannot be imposed in this case or similar cases, the question *then* is whether a prosecutor, in his discretion, could attempt to avoid the dictates of the rule by simply bringing two offenses in two separate indictments. Nevertheless, those facts and that hypothetical question are not before the Court in this case. *See Thorpe v. Housing Authority of*

reads the legislative history in light of the entire provision in question, and it does so in accordance with the prior dictates of this Court.

C. Related Statutes, If Relevant, Show the Intent of Congress to Enhance Penalties on the Basis of Prior Convictions.

Although the legislative history demonstrates that section 924(c) was intended to target recidivists who use firearms, it does not resolve the ambiguous scope of "second or subsequent conviction." Ordinarily, a review of other federal, recidivist statutes might assist the inquiry. *See, e.g., Dickerson*, 460 U.S. at 115. In this case, however, it sheds little light on the language of section 924(c) because of "the haste in this legislation" and the "considerable confusion as to the meanings of words" when it was offered and passed. 114 Cong. Rec. 22,243 (statement of Rep. Hunt, supporting the Casey amendment).

Nevertheless, various federal statutes are consistent with the construction that section 924(c)'s twenty-year enhancement was intended to apply to an offender who has a *prior* conviction under that section. *See, e.g.*, 21 U.S.C. § 841(b)(1)(A), (B) (1988) ("after a prior conviction . . . has become final," and "after one or more prior

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Durham, 393 U.S. 268, 284 (1969). In addition, economy and efficient management should not be permitted to displace the careful administration of justice. *Cf. Taylor v. United States*, 493 U.S. 906, 907 (1989) (Stevens, J., respecting the denial of the petition for writ of certiorari).

convictions"); 21 U.S.C. § 844(a) ("after a prior conviction"); 21 U.S.C. § 860(b) (1988) ("after a prior conviction"); *see also Abreu*, 962 F.2d at 1451-52 (discussing other such recidivist statutes). The United States Sentencing Guidelines also embody the concept that a recidivist or "career offender" is an offender who committed "the instant offense subsequent to sustaining at least two prior felony convictions." U.S.S.G. § 4B1.2(3) (1992); *see also* 18 U.S.C. § 994(h)(2). Construing "second or subsequent conviction" to mean a prior conviction under the statute, moreover, is consistent with the general policy underlying a recidivist statute, which is to increase the punishment for a subsequent offense when the prior punishment has not reformed the offender. *See, e.g., Rummel v. Estelle*, 445 U.S. 263, 278, 284 (1980); *Moore v. Missouri*, 159 U.S. 673, 677 (1895).[15]

D. Summary.

In sum, the legislative history of section 924(c) does not explain or elucidate the ambiguity of "second or subsequent conviction," *see R.L.C.*, 112 S. Ct. at 1334, and "a reasonable doubt persists about [the] statute's intended scope even *after* resort to 'the language and

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[15] The general policy underlying recidivist statutes and the language of related federal, recidivist statutes weigh against an interpretation of section 924(c) that would allow a prosecutor to bring two separate firearm charges in two indictments in order to obtain the twenty-year enhancement. The hypothetical question about the propriety or constitutionality of such a manipulation, however, is not before the Court in this case. *See supra* note 14.

structure, legislative history, and motivating policies' of the statute." *Moskal*, 111 S. Ct. at 465 (quoting *Bifulco*, 447 U.S. at 387) (emphasis in original).

III. PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED BY NOT APPLYING THE RULE OF LENITY TO "SECOND OR SUBSEQUENT CONVICTION."

A. The Rule of Lenity Is Rooted in Fundamental Principles of Due Process.

When ambiguity survives an examination of the statutory text and legislative history, the Court chooses "the construction yielding the shorter sentence by resting on the venerable rule of lenity." *R.L.C.*, 112 S. Ct. at 1338; *see also Moskal*, 111 S. Ct. at 465; *United States v. Bass*, 404 U.S. 336, 347-48 (1972); *Ladner v. United States*, 358 U.S. 169, 177-78 (1958). This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner*, 358 U.S. at 178, *quoted in Bifulco*, 447 U.S. at 387; *see also Whalen v. United States*, 445 U.S. 684, 695 n.10 (1980). If a statutory interpretation produces a result "so 'absurd or glaringly unjust,' " as to lead the Court to question what Congress actually intended, *United States v. Rodgers*, 466 U.S. 475, 484 (1984) (quoting *Sorrells v. United States*, 287 U.S. 435, 450 (1932)), the rule of lenity also may be applied. *Cf. Chapman*, 111 S. Ct. at 1926-27.

"Engrained in our concept of due process is the requirement of notice." *Lambert v. California*, 355 U.S. 225, 228 (1957). The Court's "long-established practice of resolving questions concerning the ambit of a criminal statute in favor of lenity . . . reflects not merely a convenient maxim of statutory construction," but rather "is rooted in fundamental principles of due process." *Dunn v. United States*, 442 U.S. 100, 112 (1979). The rule of lenity is based upon the traditional policy of fair warning "of what the law intends to do if a certain line is passed" and upon " 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.' " *Bass*, 404 U.S. at 348 (quoting H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes, in Benchmarks* 196, 209 (1967)), *quoted in R.L.C.*, 112 S. Ct. at 1338.

B. The Petitioner's Due Process Rights Were Violated Because the Lower Courts Failed to Apply the Rule of Lenity.

The district court sentenced the Petitioner to serve five years in federal prison for one violation of section 924(c) and an additional 100 years in federal prison for the other five violations of section 924(c), even though the violations were alleged in one indictment. (J.A. 28-30). The district court and the court of appeals ruled that the additional five violations each counted as a "second or subsequent conviction." (J.A. 26, 34). Because neither the text of the statute nor its legislative history clarifies whether "second or subsequent conviction" means "an additional finding of guilt rendered at any time" or "an additional judgment of conviction entered later in time," the lower courts should have applied the rule of lenity,

and they violated the Petitioner's due process rights by failing to do so.

The underlying principles of the rule and of due process beg for the application of the rule of lenity to the Petitioner, for the statute did not give fair warning that he would receive 105 years in prison the first time he ever was haled into court for any violation of section 924(c). Neither he nor any defendant should languish in prison for his natural life unless Congress has clearly said he should. The result of a 105-year sentence of imprisonment, upon the Petitioner's first appearance in court for any violation of section 924(c), is so glaringly unjust that the Court cannot but question whether Congress intended such an application of the phrase, "in the case of his second or subsequent conviction."

C. Summary.

Because the rule of lenity applies in this case, the Court must choose the construction yielding the shorter sentence. *R.L.C.*, 112 S. Ct. at 1338. Thus, the Court should hold that "second or subsequent conviction" means "an additional judgment of conviction entered later in time." If this construction clashes with present legislative expectations, "it is for Congress, and not this Court, to enact the words that will produce the result the Government seeks in this case." *Bifulco*, 447 U.S. at 400-01.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit Court of Appeals should be reversed, and the case should be remanded to that court with instructions to vacate the Petitioner's sentence and to remand to the district court for resentencing.

Respectfully submitted,

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APPENDIX A

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Title 18, United States Code, Section 924(c) (1988)

§ 924. Penalties

* * *

(c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a machinegun, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or is equipped with a firearm silencer or firearm muffler, to imprisonment for life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and –

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

APPENDIX B

APPENDIX B

EXCERPTS OF FLOOR DEBATE

HOUSE OF REPRESENTATIVES

114 Cong. Rec. 22,229-48 (1968)
(Comments containing quotations found in the Petitioner's Brief)

Statement of Representative Casey - 114 Cong. Rec. 22,230

MR. CASEY. If I may first finish my statement, then I will be glad to yield to the gentlewoman.

Mr. Chairman, they said that this amendment providing for mandatory sentences is too stiff and that it is too harsh. But let me tell you, your people back home do not think it is too harsh. I could have brought a whole wheelbarrow full of mail here, and not just from my district, but from all over this country expressing support for these stiff mandatory sentences.

Here is an Ohio paper which took a poll and of those they have counted so far, there are 705 to 22 who are in favor of stiff mandatory sentences. They want action.

The judge still has some discretion with reference to that. He can, if he wants to do it, suspend the sentence or a portion of it. He can give more than this – this is a minimum if he thinks it is justified. Mind, you, the Justice Department is not compelled to file charges – just as they have failed to file them under some of the existing statutes that we now have with regard to gun use.

Would it increase the Federal police force? I cannot see that it would. I cannot see that it would do that at all.

Primarily, these are State cases – the State police would most likely and practically 99.91 percent of the time make the charge on the offense. Then if an individual is convicted, that person would be eligible to this punishment for the use of a firearm in the commission of that offense.

If they are innocent, no case would lie under this amendment. Would we need more courts? I do not think so. Would we need more prisons? Let me tell you this. We are not using all the cells we have. The great call about rehabilitation and about a kinder attitude toward the criminal has meant that we have had 20,000 fewer prisoners in our State and Federal prisons from 1961 to 1966, a great reduction.

And what was happening while you were doing that? Offenses increased by one million from 1961 to 1966. The cost of law enforcement went up by $1 billion.

They are going to tell you that you ought to restrict this just to Federal offenses. You are going to cut the heart out of it. You can go back home, if you want to, and tell your constituents that what is left would apply to Federal offenses. In other words, cut out 99.99 of the criminals from under this sentencing and this punishment, because you only had in the first 9 months of this year 1693 cases which would qualify as Federal offenses as far as robbery, murder, and aggravated assault are concerned.

They are going to tell you, "The penologists say that this is bad." I told you the other day that right now they seldom get in there long enough for the psychologist and the penologist to shake hands with them before they are out again.

They will tell you that these are misguided children. I tell you I think the crooks are smarter than the penologists and the so-called rehabilitation experts, because most of the major crimes are committed by repeating offenders. The offenses are committed by those who are out on parole and out on bond.

The people of this country want action out of this Congress. They are looking to this Congress. This bill has nothing in it that I can see which is going to deter the criminal or punish him. What you have here is aimed at what the so-called experts want, which is to try to remove guns from the hands, as much as possible, of the citizens. That is what it is. It is the honest, law-abiding citizens who will abide by this law if you pass it. But let us have some penalties in here. Let us say one word, ladies and gentlemen, about the crook.

I yield to the gentlewoman from Oregon.

Statement of Representative Poff
114 Cong. Rec. 22,231-32

Mr. POFF. Mr. Chairman, my amendment is a substitute for the Casey amendment, but it is not in derogation of the Casey amendment. Rather, it retains its central thrust and targets upon the criminal rather than the gun. In several particulars, the substitute strengthens the Casey amendment.

My substitute makes it a separate Federal crime to use a firearm in the commission of another Federal crime and invokes separate and supplemental penalties. For the first offense, the penalty is a minimum of 1 year and a

maximum of 10 years. For the second offense, the penalty is a mimimum of 5 years and a maximum of 25 years. It will be said that the penalty structure in my substitute is less than that in the Casey amendment. While it is true that the minimum penalties are smaller, the substitute is not weaker. Indeed, the substitute is stronger. The substitute provides that the penalties cannot be suspended and that probation cannot be granted. The Casey amendment contains no such provision.

My substitute is also stronger in that it compels the court to impose the sentence to run consecutively upon the penalty previously imposed for the basic crime. The Casey amendment permits the court to make the two penalties run concurrently and to suspend any part or all of either or both.

It will also be argued in opposition to both the Casey amendment and my substitute that the minimum mandatory penalty is often counterproductive. Ordinarily, this is true for two reasons. First, when the prosecuting attorney feels that the minimum penalty is greater that the gravity of the offense in a particular case, he simply indicts for a lesser included offense or abandons prosecution altogether. If the accused is indicted and the jury feel that extenuating circumstances make the minimum penalty too harsh, they search diligently for reasonable doubt and acquit. In this particular context, however, the argument is not quite so valid. The effect of a minimum mandatory sentence in this case is to persuade the man who is tempted to commit a Federal felony to leave his gun at home. Any such person should understand that if he uses his gun and is caught and convicted, he is going to jail.

He should further understand that if he does so a second time, he is going to jail for a longer time.

The Casey amendment applies to both Federal felonies and State felonies. My substitute is confined to Federal felonies. This is for three reasons.

First, I do not want to put upon the Federal prosecutor the evidentiary burden of proving that the firearm moved in interstate commerce in order to establish Federal jurisdiction in each individual case. Every Federal felony defined in the code already has its own jurisdictional base.

Second, if State felonies are included, the caseload cast upon the Federal investigative and prosecutive apparatus would be unmanageable. Last year, State cases in which guns were used included 71,000 robberies, 55,000 aggravated assaults, and 7,700 homicides. If only a fraction of these were prosecuted under the Casey amendment, civil cases on the already crowded dockets of the 93 U.S. district courts would never be heard.

Third, as a matter of policy, I do not think it would be wise to convert State crimes into Federal crimes on such a massive scale. The Constitution reserves the police powers to the several States. What is at issue is the proper function of the federal system. What is at stake is the concept of dual sovereignties. What is involved is the danger of centralized police powers.

This new Federal crime we are creating should remain within its own boundaries and not trespass upon the domain of the States.

For the sake of legislative history, it should be noted that my substitute is not intended to apply to title 18, sections 111, 112, or 113 which already define the penalties for the use of a firearm in assaulting officials, with sections 2113 or 2114 concerning armed robberies of the mail or banks, with section 2231 concerning armed assaults upon process servers or with chapter 44 which defines other firearm felonies.

Mr. PUCINSKI. Mr. Chairman, will the gentleman yield?

Mr. POFF. I yield to the gentleman from Illinois.

Statement of Representative Poff
114 Cong. Rec. 22,232

Mr. POFF. First of all, I thank the distinguished gentleman for his support of my amendment and second may I commend him for the knowledge and insight which he has displayed with reference to this problem.

The answer to his question is in the affirmative; namely, it would be expected that the prosecution for the basic felony and the prosecution under my substitute would constitute one proceeding out of which two separate penalties may grow.

Statement of Representative Harsha
114 Cong. Rec. 22,234-35

Mr. HARSHA. Mr. Chairman, I rise to commend the gentleman from Virginia.

Mr. Chairman, I rise in support of the substitute amendment offered by the gentleman from Virginia. I had a similar substitute prepared to offer, but the Chair recognized the gentleman from Virginia first and this is certainly as it should be, because the gentleman from Virginia is a member of the Judiciary Committee which is handling this bill, and, according to the rules of the House, members of the committee handling the legislation should have priority in matters of this kind, and I certainly agree with this procedure.

The gentleman from Virginia is attempting to do what I have attempted to do in my amendment and in my proposed bill which I introduced dealing with this matter of crime and the use of firearms. The emphasis should be, and we are in agreement, on the user of the weapon, rather than the weapon itself. Certainly, if we are going to vigorously combat this problem of crime, we are going to have to have not only stricter measures dealing with the subject, but we are also going to have to require a vigorous prosecution of those measures and incarceration of the guilty, so as to provide the strongest deterrent to preclude the repetition of the crimes of violence and the unlawful use of firearms in their commission.

For too long now the emphasis, by judicial interpretation, has been placed on the "rights" of the criminal to the neglect of his responsibility as a member of society and to the neglect of the rights and privileges of the law-abiding citizen. Courts in many cases have been too promiscuous in their use of probation and too lenient in their exercise of judicial discretion and suspension of criminal penalties.

As I previously said, I had introduced a companion measure to the so-called Casey amendment, and yet while I strongly believe that his amendment is a step in the right direction, I am quick to realize that there are some problems with the provision that requires those merely having a gun in their possession to be subject to the same penalties as those who actually use that weapon in the commission of a crime. On the other hand, the situation is so abnormal and of such paramount interest to the welfare and security of our law-abiding citizens, I feel that we have to adopt stringent measures to remedy the situation. While I can see that the substitute of the gentleman from Virginia is a perfecting amendment and eliminates the possibility of probation or suspension of the mandatory minimum sentence for both first and second offenses, I regret that his substitute only covers the violation of Federal crimes. Unfortunately, this does not cover the bulk of crimes because most of them are violations of State laws. Hopefully, State legislatures will take the necessary action to cover these problems. Admittedly, police protection and law enforcement is a local matter, yet because of the gravity of the situation and its national scope, I think the Federal Government has a proper role to play in dealing with the problem.

Mr. Chairman, rather than to control guns, I think that the solution to this problem is to control crime. The criminal always finds a way to obtain a weapon and I fear that by legislation dealing with weapons, if we are not exceedingly careful, we may be providing the criminal with additional advantages over the law-abiding citizen and, rather than restricting the use and possession of

weapons by criminals, we may wind up by prohibiting the lawful use of weapons by the law-abiding citizen.

Mr. Chairman, while my amendment is more restrictive and imposes more severe penalties than the amendment of the gentleman from Virginia, his is a much needed step in the right direction and I can certainly wholeheartedly support it. I would urge my colleagues to adopt this amendment so that if we are to have legislation dealing further with the use of guns, we can make that legislation meaningful and effective by placing the burden upon the criminal rather than on the law-abiding citizen.

Statement of Representative Rogers
114 Cong. Rec. 22,237

Mr. ROGERS of Florida. Mr. Chairman, I move to strike the requisite number of words.

Mr. Chairman, I want to say that the proposal of the gentleman from Virginia [Mr. POFF] is I believe a realistic amendment. I personally have felt that we should put a minimum penalty of 5 years for any crime in which a gun was used which penalty could not be suspended, and no probation granted by the judge.

On July 2 I introduced a bill, H.R. 18287, which would provide an additional 5 years imprisonment where a firearm was used in the attempted commission or commission of certain Federal crimes such as homicide, robbery and burglary assault, kidnaping, and others.

In addition, my bill provides that the 5-year penalty which would be assessed could not be suspended, nor could probation or parole be granted.

I am particularly concerned over the lack of proper penalties being imposed by the courts right here in the District of Columbia.

I examined the sentences imposed by the U.S. District Court in and for the District of Columbia during 2 weeks in June of this year.

Of 17 crimes committed with the use of a gun, six of the criminals involved received suspended sentences.

Well, it does no good to put a heavy penalty on a crime that may be assessed but that is never assessed. What we need to do, I believe, is follow the philosophy that we are stating in the Poff amendment which follows the principle set out in my bill. I support very vigorously, this amendment which would at least put a minimum sentence that may not be suspended and no probation granted by a judge, so that any person who commits a crime and uses a gun will know that he cannot get out of serving a penalty in jail. And if he does it a second time, there will be a stronger penalty.

Because it does no good to say, well, we will have a 25-year jail penalty for any crime if the penalty is never used – or is suspended.

In other words, Mr. Chairman, we have to have a penalty that a person knows he will experience with certainty.

So, Mr. Chairman, I believe the philosophy is correct, and I would hope that the Poff amendment is adopted.

Statement of Representative Whitten
114 Cong. Rec. 22,238-39

Mr. WHITTEN. Mr. Chairman, I move to strike out the last word.

Mr. CHAIRMAN, I take this time to point out the fact that many people throughout the Nation have been led or misled into believing that some gun control law would prevent crime or cause a return of law and order. I do not think there is any question but that most people can see that law enforcement and law and order have broken down. They want something done. Something must be done to return to law enforcement, where the criminal can be sure of being arrested, tried, convicted and punished, for that is the real deterrent to crime.

To provide by law for the Federal registration of guns will not get the job done, or even to require that all guns be turned in to the Government would not accomplish what we need, for the good citizen would register or even turn his gun in; but the outlaw, or the crowd which is committing these crimes of murder, assault, robbery and riots would never do so – leaving the law-abiding citizen even more at their mercy.

The trouble is the Supreme Court and other courts bound by it have broken down law enforcement, and we will never get a return to law and order until we go after the Court.

I am not sure of the total number, but reputable people have counted the Supreme Court and other Federal court decisions and find that in 30 or more cases,

newly found Court-created rights of the individual criminal have been put ahead of the welfare of the general public.

Others who have counted their decisions have pointed out that in 10 cases they have more and more restricted or tied the hands of the policeman or the law enforcement officer, making it next to impossible to obtain evidence which the Court will permit to be used, to make a case against a law violator.

Now if the Supreme Court through these decisions will not let convictions stand for murder, rape, robbery, and all the rest, what makes you think that there will be any punishment imposed for committing such crime with a gun? After all, as I have pointed out, if you could convict him and punish him for the crime, which would be a condition precedent for the gun punishment, we would have the crimewave broken anyway.

The gentleman from Florida [Mr. PEPPER] offered his resolution to set up a Joint Committee on Crime the other day. It was adopted by the House. At that time I asked him if he planned to review the decisions of the Supreme Court and the other courts which were bound thereby, as well as the action or nonaction of the Department of Justice and the part they had played in effect causing the wave of unbridled crime. First he said yes, then later retracted and said his bill "authorized" such investigation.

Let me point out a few things to you here. Any bill you pass or any amendment you pass here today, for instance, will not be self-enforcing. As was pointed out a

moment ago, the amendment now pending provides penalties for using a gun in committing a crime. Think about that a minute; you will note that before you can convict the accused of so using a gun you must first convict him of the robbery or murder, or the crime he is charged with committing "with a gun" as the case may be, and have the conviction upheld. If we could count on that, that is, conviction and punishment for robbery or murder, riots, et cetera, we would break up the crime wave anyway, or really we would not now have such a wave of crime.

For proper law enforcement or to prevent crimes from occurring, to protect the public, several things are required – good officers, good jurors, and good judges so that arrest, trial, conviction and punishment will be certain.

What chance does the public have when the Supreme Court makes it next to impossible for the policeman to arrest or to obtain evidence which the courts will let the prosecutor use, and makes jury service for the irresponsible citizen a matter of right. Those of us with trial experience know that it takes more than average courage for a juror to bring in a verdict of guilty that will send someone to jail or to the penitentiary. Many good people are too softhearted for such duty.

My friend, Congressman CELLER, and his Committee on the Judiciary, not too long ago, passed a bill which made it a right, not a privilege, for almost any person who is breathing and 21 years old to serve on a jury. What chance has a prosecutor got to protect the people before a jury of irresponsible persons?

Our Committee on the Judiciary needs to go to work on the law of evidence and on the actions of the Federal courts which have tied the hands of the police, of the prosecutor, and of the trial courts. They put the rights of the criminal, newly found by this Supreme Court, ahead of the public interest.

I have the highest regard for my friend from Virginia [Mr. POFF]. In his substitute, he makes the penalty for committing a crime mandatory. What is he really trying to reach? He is trying to reach the judges who are turning these people loose and fix it so they can no longer turn the guilty loose on a defenseless public.

Those of you who have had experience in criminal cases also know that if you get your penalty too severe, you increase your chances of a sympathetic jury failing to convict. We must recognize that it is the Supreme Court of the United States claiming to itself rights that no court before this one ever claimed, admittedly releasing people who are guilty on technicalities which Judges of the present Supreme Court claim to have found in the Constitution.

If your court is not going to let the policeman legally arrest, or the prosecutor use the evidence, and if this Committee and the Congress will not let you have a stout, stronghearted jury, if you cannot convict a man for the murder, rape, or robbery that he commits, what could you do about punishing him for committing a crime with a gun when you failed to convict him of the crime itself.

Mr. Chairman, the public is being misled, unknowingly, perhaps, by this bill.

Mr. Chairman, I would like to read an editorial from the Mobile, Ala., Register, containing quotes from remarks I made to this House in August 1966. I quote:

TIME TO WAKE UP AND QUIT FIDDLING

Some things said in Congress the other day by Representative JAMIE L. WHITTEN of Mississippi were remindful of that familiar phrase about fiddling while Rome burns.

"The American people," he said, "have had enough of trials being delayed, the guilty going free on technicalities, property being destroyed, our police being pushed around.

"They have a right to expect us to do something to restore law and order, for involved is the destruction of responsible government.

"Here we are with the greatest wave of lawlessness facing our country all across the land, and yet the Congress, which should take to heart its own responsibility, is busy spending days and days protecting the rights of the irresponsible to serve on juries. Now, is that not a ridiculous thing for us to do, when we should be busy trying to make punishment for crime more certain?"

Mr. WHITTEN, continuing to emphasize the problem of lawlessness in the face of inadequate effort to stamp it out, told his colleagues:

"We find in today's newspaper reports from at least eight or 10 states throughout the nation where on yesterday criminals were running wild, destroying lives and property.

"We see on every hand the court's getting away from the rule on which orderly government was built, a general rule to the effect that if the record clearly showed the

guilt of the defendant beyond a reasonable doubt, he or she would not be released on the public on some technicality and particularly a technicality raised by the appellate or Supreme Court itself.

" . . . It is said that Nero fiddled while Rome burned. It strikes me that is about what we are doing here.

"At a time when our country is becoming the victim of the criminal, when our wives and daughters and we ourselves are afraid to walk our streets, we find the Congress spending these hours and days trying to protect the rights of irresponsible persons to sit on a jury. . . .

"We need to do something about crime and criminals. We need to make punishment more certain. We need to put the rights of an orderly and lawabiding society ahead of the whims of the Supreme Court. . . .

"It is time to wake up here and quit fiddling. Rome is certainly burning, and if you do not believe it, read today's newspapers."

There is a glaring misfortune in regard to remarks such as Mr. WHITTEN made in Congress in this instance. The misfortune is remarks of this kind are not made by enough members of Congress and enough other Americans.

But no American with his eyes open should fail to see that it is time to wake up and quit fiddling.

As a postscript to Mr. WHITTEN's remarks, we call attention to this excerpt from a Chicago dispatch at weekend by United Press International:

"Hoodlums broke windows in a suburban department store and stole 24 rifles and shotguns from displays after a rampage of violence during which a policeman was shot by a sniper."

More proof that the time has come in the United States to wake up and quit fiddling. Not only is it time to wake up and quit fiddling – the need for that is acute, urgent, imperative. The longer the delay, the greater and more alarming the danger.

Why the delay – why the reluctance to take urgently needed action with courage, forthrightness and resolution? Two prime factors in why this action is not taken are: Stupidity and politics. The American people cannot afford the brands of stupidity and politics that leave them exposed to the violence and crime of the lawless.

Mr. Chairman, conditions are terrible. We must take action. However, we will never solve this problem by making it a crime to use a gun to commit a murder, when we cannot convict the accused of the murder itself.

We will never solve this problem by making it possible for the wrong kind of officials to call in the guns of law-abiding citizens when they know and you and I know they cannot get the guns of outlaws.

There is only one way to save this country of ours; and that is for the Attorney General, the Department of Justice, and the Federal courts to back up local law-enforcement officers, instead of nullifying their efforts. If some change is not soon made, you will have no policemen; for no one would have the job. Conditions will border on those of the Middle Ages, where it was every man for himself – and there was little for anyone.

Our Committee on Judiciary needs to give its attention to these facts – the present age may not be as dark as the Dark Ages, but it is rapidly headed in that direction.

Statement of Representative Hunt
114 Cong. Rec. 22,243-44

Mr. HUNT. Mr. Chairman, I move to strike out the last word.

Mr. Chairman, much has been said here today about the haste in this legislation. There is considerable confusion as to the meanings of words and as to the jurisdiction of the court.

I would like to point out to this body that the crux of the matter we are trying to get at today insofar as this particular phase is concerned was best explained by the gentleman from Ohio [Mr. LATTA].

It is a well known fact, regardless of what the preceding speaker said, that strong deterrent action has been the greatest cure for crime.

It cannot be disputed in any way, if you go back and look at the analysis of crimes, that tough judges and strong sentences have always been a deterrent to crime.

I am not one of those who would give them a pat on the wrist for using a gun in the commission of a crime.

Where I come from, we give people 30 days to 1 year for being disorderly. Anyone who carries a gun in the commission of a crime is not there for the purpose of attending Sunday school. He is not that helium-headed person who gets a little bit drunk on Saturday night and gets the same penalty. He is the man who goes out taking a gun to commit a crime whereby he might take another person's life, if he panics or is the hardened criminal type without conscience.

Today we are trying to find a remedy for crime in these United States regardless of creed, color, or anything else.

I say to the gentleman from Alaska who is going to offer an amendment that 5 years is and should be the minimum mandatory sentence where a gun is used to commit a crime.

I am going to support the Casey amendment. I believe what the gentleman from Ohio [Mr. LATTA] has said today makes sense.

I simply say to you ladies and gentlemen in this Chamber – Do not lose the sight of the fact that in some cases amendments that have been proposed here today are inadequate. The atrocious murder of Senator Kennedy in California would not be covered by the terms of certain amendments that have been offered here today. We seek to correct the repetition of that murder by appropriate punishment for anyone who so conspires.

We are simply trying to stamp out crime. We are not here to conduct a Sunday school class, and we are not here to give them a sentence whereby they can stand on their head for one year and get out. It is a fact also that one-third of the policemen in this country who were killed by gunmen last year were killed by men who were on parole.

Mr. Chairman, I say to you that this is the time to stand fast and to enact a strong law to deter crime in the United States, or else quit and go home.